FILE COPY

No. 329

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

THE UNITED STATES OF AMERICA, Petitioner

vs.

JOHN L. GILLS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INDEX

Subjects

Style and salutation 1

Authorities relied on by respondent 4- 5

Decisions cited by Petitioner *not* in conflict with decision below 5-11

Brief of argument 1-15

Conclusion and prayer 15

INDEX TO AUTHORITIES

21 A & E. Enc. L. 366 ..... 4- 5

Bishop, Stat. Cr. (3rd Ed.) ch. xxii, Secs. 191-4;
ch. xxiii, Secs. 199-B, 220 5

Cochran v. U. S., 157 U. S. 287, 293-4 ..... 3- 4
Cooper v. U. S. 9 Fed. (2) 216, 222 10
7 C. J. 801, Sec. 696 5

Hargreaves v. U. S. 75 Fed. (2) 68 10-11

Kittenbach v. U. S. 202 Fed. 377 7

Lewis v. U. S. 22 Fed. (2) 760 9-10

Morse v. U. S. 174 Fed. 539 ..... 6- 7

Peightel v. U. S. 49 Fed. (2) 230, 237 4

Richardson v. U. S. 181 Fed. 1 ..... 4- 9

Scott v. U. S. 130 Fed. 429 7
State v. Asol (Mont.) 256 Pac. 1071, 1081 4
State v. Davidson (Dak.) 180 N. W. 31 4

Twining v. U. S. 141 Fed. 41 4

12 U. S. C. A. Sec. 592 p. 427 4
U. S. v. Booker, 98 Fed. 291 4
U. S. v. Brewer, 139 U. S. 278 ..... 2- 5
U. S. v. Eqe. 49 Fed. 852, 853 ..... 4- 5
U. S. v. Fish 24 Fed. 585 7
U. S. v. Herrig, 204 Fed. 124 4
U. S. v. McClarty, 191 Fed. 523 4-12
U. S. v. McClarty, 191 Fed. 518 4-12
U. S. v. Noveck 271, U. S. 201, 204 5
U. S. v. Potter, 56 Fed. 97 5
U. S. v. Wiltberger 5 Wheat. 76, 79 2

No. 329

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

THE UNTED STATES OF AMERICA, Petitioner

vs.

JOHN J. GILES

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The opening assumption in the argument for the Government that the decision in the instant case is "in direct conflict with" the decisions of other Courts, can proceed only, we respectfully suggest, from a misapprehension of those decisions in respect both to the facts they deal with and the principles they announce; while the concluding argument, contained in the doubtful assertion the decision creates "a large loophole—in the criminal statute" certainly affords no reason for the writ even if correct. The mind of the prosecutor will find expression in such argument;

but the answer is the time-honored one that our courts may not "insert a clause in the statute which Congress omitted"; or, (in the language of Mr. Justice Blatchford for this court) that

> "—before a man can be punished his case must be plainly and unquestionably within the statute." (U. S. v. Brewer, 139 U. S. 278); and (with Mr. Chief Justice Marshall) that "—it would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated". (U. S. vs. Wiltberger, 5 Wheat. 76, 96).

The utter fallacy of the government's contention may be exposed in this simple example: That statute, imposing by its plain language a penalty on him "who makes any false entry" would, under this contention, make every employee or agent guilty of *making a false entry* who, in the course of the day—at least after the last preceding count of the cash—might embezzle or steal one dollar, or ten dollars, or other sum, of the bank's money; for this would, of neccessity, *result* in false entry by his "criminal agent", the innocent and unknown bookkeeper, of the amount of cash on hand. That such obviously unintended absurdity would result from the construction contended for cannot be doubted. The reason the contention is fallacious is that it would punish, *not* the thing made punishable by the statute, (the *making* of the false entry), but the doing of, or omission to do, an act which may *conduce* to, or *result* in, not the entry itself, but the falsity of an entry to be later made independently by another with whom, and with whose entry, the actor, as in this case Giles, had no con-

nection. Giles here had no part in, nor connection with, nor control of, the making of the entry, nor no duty to make it or to see that it was made. Whatever duty he owed was to his employer, not to the bookkeeper. The most that can be said of him is his act would *contribute to the falsity* of the entry when, and if, it should be later made by the bookkeeper. By exactly the same token, and exactly in the same degree, the bank porter who might purloin a dollar from the desk, or drawer, or locker, would contribute to the falsity of the entry as to the cash on hand, when and if the bookkeeper should make that entry. Indeed, the porter's case would present a stronger one, for, we apprehend, the bank's bookkeeper would, as a matter of course, at the end of the day, make entry of the amount of cash on hand as that changes each day; while no entry would, we apprehend, be made in the account of a customer in the individual ledger unless the previous entry were reduced or augmented by withdrawal or deposit in that account. It will not be doubted we are correct in saying it is the *making* of the entry,—the *entry* itself—and not the doing of some act, however wrongful, which may *result* in the entry being false as made by some other independent person making it, in the course of events, which the statute denounces. This is said on authority of the plain words of the statute, and of this Court in the Cochran case, 157 U. S. 287, 293-4, where it is said "the penalty imposed—is affixed to the *one who makes*—is affixed to the *making* of the false entry",—not to some other, or to some other's independent precedent act, however wrongful, which may, in the course of events, or by circumstance, *lead to*, or *result in*, the *falsity* of the entry. That this is true, and that the act of Giles was a distinct and wholly different act, remote from the making of the entry, and connected with it only by

subsequent circumstance and remote act performed independently by another over whom he had no authority, cannot be gainsaid. That being so, then, in order to hold Giles guilty of the *making* of the entry (which is all the statute denounces) we must impute to him the independent act, subsequently performed, of another, whom he had not employed, controlled, directed, nor spoken or written to, and at whose performance Giles was not present, and who would have made his entry whether Giles' withholding the deposit slips had contributed to its falsity or not, and even if Giles had not received the deposits.

The contention can but illustrate how far afield we wander in the realm of loose construction instead of confining ourselves within accepted bounds of *strict* construction (as this Court has so often said we must), when we attempt to "include by construction" an act supposed to be "within the mischief" but not "clearly within the letter", of the penal statute.

What the accused did is not covered by, and does not render him punishable under, the statute:

12 U. S. C. A., Sec. 592 p. 427;
U. S. v. McClarty, 191 Fed. 523;
U. S. v. McClarty, 191 Fed. 518;
U. S. v. Herrig, 204 Fed. 124;
U. S. v. Booker, 98 Fed. 291;
Twining v. U. S. 141 Fed. 41;
State v. Davidson (Dak.) 180 N. W. 31;
State v. Asol (Mont.) 256 Pac. 1071, 1081;
U. S. v. Eqe, 49 Fed. 852, 853;
Peightel v. U. S., 49 Fed. (2) 230, 237;
Cochran v. U. S., 157 U. S. 287;
Richardson v. U. S., 181 Fed. 1;

7 C. J. 801, Sec. 696;
21 A. & E. Encyc. Law, 366.

That the statute is to be strictly construed, and the act of accused unmistakably within its plain words; that it may not be extended by construction; and that all reasonable doubt of its meaning must be resolved in favor of accused, see:

U. S. v. Brewer, 139 U. S. 278;
U. S. v. Noveck, 271 U. S. 201, 204;
U. S. v. Eqe; 49 Fed. 852, 853;
U. S. v. Potter, 56 Fed. 97;
21 A. & E. Encyc. Law, 366;
Bishop, Statutory Crimes (3d Edition 1901), ch. xxii, secs. 191-194; ch. xxiii, secs. 199-B, 220.

That the decision under consideration is not in conflict with those in either the Morse, Richardson, Lewis or Hargreave cases, cited by the Government, may be quickly demonstrated.

In the instant case, by the undisputed facts as expressed by the Government itself in its bill of particulars (tr. 19-20) the *act* committed by defendant, (a paying and receiving teller in separate department from, and in no way having authority over, the bookkeeping department) "which caused the false entry—*was the withholding* by him and the *failure* by him *to turn over* to the bookkeeping department, in the usual course of the bank's business, a deposit slip". That is the Government's case, expressed in its own language, in its bill of particulars, as to each the third and fourth counts under consideration. All else that need be understood is that, having received the two deposits in question, and having placed the proceeds into the bank's

funds where they belonged, he placed the deposit slips themselves in a cigar box on his desk, instead of in the drawer with other deposits where the bookkeeper would send and find them in the course of the day's business; and in consequence these deposits were not entered on the individual ledger in that day's business. As the Government itself plainly expressed his act, it was but the *negative* one of "withholding and failing to turn over" the deposits slips. The entry itself was made by a bookkeeper, in his absence, without his knowledge or direction, and over whom he had on authority.

In the Morse case, accused was executive officer and active head of the bank, the bookkeeper and his secretary directly under his control. In furtherance of his own scheme as head of the bank, to defraud and conceal, and by his own direction, he had his secretary execute a bogus or sham note, and had the bookkeeper enter the transaction as a loan, when in fact the transaction was a speculative purchase by the bank of stocks, in violation of law. He planned and directed the whole transaction, and it was by his express procurement and direction that the false entries were made, by means of his secretary taking the false documents to his bookkeeper, who entered the transaction on the books. All elements, including his planning, devising and executing the scheme, and directing through his secretary, the entries, were submitted to the jury and found against him, on what the court held was ample positive and circumstantial evidence to sustain the finding. The Appellate Court said that such an entry when not made by the accused himself, must have been made by *his direction and* procurement, but that it was "immaterial" whether he, in making the entry

> "acts through pen or a *clerk controlled by him*—it seems to us that defendant is as fully responsible for any false entries which necessarily resulted from the presentation of these pieces of paper which he caused to be prepared (with the purpose of having them entered). as if he had given oral instructions—or had written them himself—there is no doubt here that defendant himself caused" his secretary to

leave the papers with the bookkeeper, from which the latter made the entries; and it was held the evidence showed Morse knew and directed that the entries should be made. There, needless to say, we have the case of his affirmative act, his control of the employees, and his direction that the entries be made,—a plain case of *facit per alium.*

The only parallel found is in the single fact the bookkeeper, or record clerk, apparently acted innocently without knowledge of the falsity of the entries. This is true in a number of recorded cases, and it is not contended of course, that guilty knowledge by the actual entrant is essential. The court manifestly had no intention to go beyond the decisions which rest the reason for the holding of responsibility on part of the directing officer on either the statutory rule of principles, or else on that "fundamental principle of agency" expressed in the maxim *qui facit per alium facit per se*,—as for instance, the cases of Kittenbach vs. U. S. 202 Fed. 377 and U. S. vs. Fish 24 Fed. 585, which rest the decision directly on the doctrine of principles, and of Scott vs. U. S. 130 Fed. 429, which bases it as well on the doctrine of *facit per alia*. Giles not having made the entry, what possible doctrine, known to the law, could make him guilty of its making, except he be a principal or except he be liable under the rule *qui facit per alium?* Yet surely no one would contend, under these facts, Giles was

a principal with whatever clerk or clerks, in routine duty, made the entries, in his absence, unknown to him, pursuant to no conspiracy with him, entirely beyond the scope of Giles' duty, and without his direction, contact or procurement; nor that the doctrine of *qui facit per alium*, the rule of agency, applies. If such absurdity were so, the porter above referred to, who stole the dollar from the cash, would thereby be a "principal" with the bookkeeper who later independently entered the cash on his record as one dollar more than in fact the bank had, or else would have become the *superior* of the bookkeeper and made the latter his "agent" to make the false entry; and in either event we would have the purloining porter guilty of the false entry.

The Government's contention here assumes, erroneously, too, that the *withholding of the information* was the *making of the entry* (which latter alone the statute punishes), whereas the negative act of withholding, and not reporting, had no direct relation to, and may not be said to have been, the making of the entry, but related and conduced *only* to the *falsity* of the entry made independently by another. The bookkeeper would no doubt have made his entry whether Giles reported or not. He would have made his entry, as he did, if the deposits in question had not been made, or if Giles had lost the slips, or forgotten the fact of the deposits, or if for any other conecivable reason the slips had failed to reach the particular bookkeeper who worked on those sheets of the ledger within the alphabetical range of which the first letters of the depositors' names fell. The *entry*, therefore, was *made* independently of Giles, or of any act of his, and without relation to the fact that his omission had conduced to its falsity. In short, Giles' act, undoubtedly, in the sequence of events, conduced to the

falsity of the entry, and to that only. But the offense lies in the *making* of an entry, and that only.

Plainly, and as well decided, the offense prescribed is the *making* of an *entry* which is *false, not* that an accused *made false an entry independently made by another.*

The Richardson case, like the Morse, was where one of the executive heads of the bank, the cashier, directed his clerk to make the false entries. The District Judge said

> "There is nothing in the contention that the defendant should have been charged as aiding and abetting, and not as a principal—the entries and items falsified were the work of others, but they were clerks, *acting under the direction* of the defendant—they may or may not have acted with knowledge so as to be guilty themselves, but the case does not turn upon that point. Where an act is done *by the procurement* of a person it is his act in effect.—'He is as guilty if he *directed* false *entries to be made* by the clerk or bookkeeper as if he made the entries in person' ".

Nothing in that decision contravenes the one here. It is a plain case of *"facit per alium."*

All that was involved in the Lewis case which is pertinent here was

> "that the reports to the Comptroller of the Currency were not made by the defendants",

(President and Vice President of the Bank,) with

> "practically complete control of its affairs".

Mr. Justice Van Valkenburgh, for the 8th Circuit, said the evidence showed the reports

> "were sent and caused to be sent by the defendants, and with their knowledge, whether by explicit direction in each case is immaterial. Morse v. United States (C. C. A. 2) 174 F. 539, 20 Ann. Cas. 938. As to the responsibility of *officers having control and management*, see opinion of this court in Cooper v. United States (C. C. A.) 9F (2nd) 216-222.

The Cooper case, referred to in the decision just considered, was one charging the Coopers with defrauding the Government in income and excess profit returns. It was claimed knowledge on part of the defendants was not shown. Judge Van Valkenburgh there said:

> "They were in sole and entire charge of the business: upon them was enjoined the duty of making those returns under oath—he must be held to know that which it is his duty to know, and which he solemnly promulgates. We do not by this recognize imputed or presumed knowledge or intent. We merely hold that the situation present is one from which the jury was entitled to infer knowledge on the part of the defendants".

The last decision claimed to be in conflict is the Hargreaves, 75 Feb. (2) 68. Nothing in that case touches the point. Hargreaves, executive head of the bank, was convicted of misapplication and false entries by means of sham notes whereby he was surreptitiously getting money from the bank for his own use. The court said concerning the false entries in the reports, they were based on notes made by third parties, the proceeds of which were diverted to Hargreaves, and the testimony showed the notes were signed

by dummies, the makers having no expectation of paying, and receiving no consideration, with no intention of assuming liability, and they were accepted by Hargreaves with that understanding; then quoted with approval from the parallel Morse case, the following:

> "The jury were warranted in finding that these were merely sham notes, that the makers gave them with no intention of assuming responsibility, and that the bank accepted them with the same understanding.
>
> "The entries in question found their way to the books and reports because the defendant set the machinery in motion which required the entries to be made. He knew every detail of the various transactions. They were all devised, accepted or engineered by him, and the jury were justified in find that the entries were false, and that they were made with intent to deceive."

The foregoing exhausts the decisions claimed to conflict with that in the case at bar. Comment to demonstrate the contrary is unnecessary. In each case the accused was an executive head, and in charge of the concern for which he acted in making the false entries, and in each case they were made by his subordinates under his control and direction, with his knowledge and approval, and by his direct procurement. All that is held in any of such decisions wherein they may be said to go beyond the plain and express words of the statute itself is, in line with many cases, that where one in authority knowingly, and with requisite intent, procures the entry to be made by another under his direction, he is guilty as if the entry were "made with his own pen". This, we conceive, is not extending the statute by construction, but rather is by virtue either of the law of principals, or else on the sound principle that one who

"acts through another acts himself". On no other sound foundation could these decisions stand. But we think on those they are grounded on impregnable principle. In the very nature of the principles governing the construction of criminal statutes, to go beyond the one or the other of these well known and oft applied doctrines would be unwarranted and unsound, as being an extension of plain words by construction. He cannot be guilty of "making" an entry who neither makes it, nor is a principal with another in its making, nor who does not by some affirmative act procure another to make it. The distinguished and venerable Judge Evans, who wrote the decisions in the two McClarty cases, was right. He but wrote the plain dictation of this court, as found in the great decisions from which he quoted, in accord with all authority announcing the essential principles governing construction of criminal statutes. Those two decisions, had he, in his long service on the bench, written no other, would have stamped him a great and just judge. Though the prosecutor may, and, as experience teaches us, will, in his impatience at the restraints of rule, inveigh, we respectfully submit, those great decisions, like those on authority of which they were written, and like the truly great majority opinion in the instant case, ought to stand, as judicial bulwarks, not only to safeguard the citizen who is entitled to have our penal laws so clearly expressed as to convey their plain meaning, not to have them left to be made a catch-all by doubtful implication, but, for the probable greater reason, that those charged with enforcement of such laws may not exceed just bounds and thus themselves oppress, where they are but expected to protect, society.

What has been said will sufficiently expose the un-

soundness of the extreme minority view,—extreme not only in its non-parallel illustrations, but in its interpretation of the relative duties and relations of accused and the bookkeeper, and of the acts of Giles beyond even what is asserted by the prosecution: typical, too, of that harsh attitude which would presume all against one shown to have committed error, even of judgment, and supply by implication and "construction", whatever is lacking in the law to enforce punishment.

Respondent, Giles, did not make any false entry. The only entry he made—that in the customer's pass-book—was correct. He directed no one else to make an entry. He made no memorandum from which anyone else made, or might make, an entry. He just omitted to place the two deposit slips in the drawer whence they might be later, in the day's business, found by those charged with the duty of conveying them to the bookkeeping department, and thence their amounts entered by bookkeepers in the customer's accounts. Instead, he placed them on top his desk, in a cigar box where he kept odds and ends, intending to *later* place them in the drawer whence they would go to the bookkeepers. It is not shown he even knew, or had reason to know, the bookkeepers would be called on to make any entry or change in the customers' accounts, until the deposits should be reported. He placed the cash, which the deposits represented, in the bank's cash, where it belonged. His cash was short by the sum of those deposits,—not, however by any fault or wrong on his part. This fact is conclusively established by the undisputed evidence, and by the verdict of acquittal on the first two counts. He took no money. He did no other wrong, other than to "withhold", for the time being, the deposit slips,—this much,

as to the false entry counts, by the government's admission, in its bill of particulars. The sum total of his offense, says the Government (tr. 19,20) "was the withholding by him and the failure by him to turn over to the bookkeeping department, in the usual course of the bank's business, a deposit slip". He would not withhold the deposit slip permanently, but would later turn it in, where it would go on the records. His only reason for the temporary withholding was in the error of judgment that he feared to report a shortage in his cash which he did not cause, was not responsible for, but could not account for. He was not the superior of, and owed no duty to, the bookkeepers, his duty, of course, being to his employer. He had no direction or control over the bookkeepers, and attempted none. It is not true he said "silently", or otherwise, to the bookkeeper (as the minority opinion would say) "these deposit slips placed in the drawer are all", nor to make entries according to them. That is but the figment of an imagination which would disregard the evidence and leap beyond the law, by implication, which every rule of criminal construction forbids. It might be conceivable had he *altered* or *changed*, augmented or reduced, the amounts of the slips in his possession, and *so reported them*, semblance of justification would be afforded for the conclusion in the minority opinion. But he did not do that. He did not make any report. He did not give any direction, express or implied. He did nothing toward the making of an entry. His act was wholly negative. He merely "withheld the slip". He sent no "poisoned candy", by mail or otherwise, — he "withheld" sending anything. He did not "deny necessary food" to the prisoner to feed and sustain whom was his exclusive duty; for his duty was only to his employer, the bank itself, and he owed no "duty" to the bookkeeper as

such,—and the harsh and unwarranted conclusion that the latter was *his* "agent" cannot do duty to make him so. All agency law repels the implication. Moreover, as soon as the bank failed, and he realized he could not, by finding the lost cash, or locating the responsible party who took it, recover or recoup the loss, he himself reported it, when no one else knew it, and himself assumed full civil responsibility for the disappearance of the cash while in his charge, and paid the shortage for which he was not responsible, in full—$1000.00 with borrowed money, the remainder with the proceeds of sale of his home. These are the undisputed facts. If he had had before him, at the moment, our statute which says, and says only, that an employee "who makes any false entry in any book, report or statement" thereby is guilty of an offense, it certainly would not have occurred to his mind, even had he been a lawyer, instead of a layman, that his act in withholding the deposit slips could by possibility be construed or tortured into the offense of making false entries. Except, therefore, all responsible authority be wrong when it says the natural meaning of the plain words of a statute may not be extended by construction to create an offense not clearly expressed, but that "before a man can be punished his case must be plainly and unmistakably within the statute", the case here presented is not so, and no reason exists why the petition sought should be granted.

Respondent respectfully prays that the petition for writ of certiorari be denied.

Nat Lewis Hardy

NAT L. HARDY
Counsel for John J. Giles, Respondent.

FILE COPY

FILED
JAN 11 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 329

THE UNITED STATES OF AMERICA, *Petitioner*,

vs.

JOHN J. GILES

BRIEF FOR RESPONDENT

NAT L. HARDY,
WILL A. MORRISS,
of San Antonio, Texas,
Attorneys for Respondent.

THE STANDARD PRESS, INC., San Antonio

SUBJECT INDEX

	Page
Correcting Petitioner's Statement	1
Summary of Argument for Respondent	6
Discussion	8

TABLE OF CASES CITED

Anderson vs. State, 27 Tex. App. 177	27
Banner vs. State, 44 Tex. Crim. Rep. 42	29
Blum vs. State, 20 Tex. App. 578	30
Cochran vs. United States, 157 U. S. 287	16
Fasulo vs. United States, 272 U. S. 620	15
Kettenbach vs. United States, 202 Fed. 377	20
Lewis vs. State. 119 Tex. Crim. Rep. 265	13
People vs. Green, 22 Cal. App. 45	30
People vs. Watson, 154 Misc. 667	27
Prettyman vs. United States, 180 Fed. 30	23
Prussian vs. United States, 282 U. S. 675	15
Reg. vs. Butt, 15 Cox C. C. 564	26
Reg. vs. Conde, 10 Cox C. C. 547	27
Reg. vs. Instan, 1 Q. B. 450	27
Richardson vs. United States, 181 Fed. 1	20
Scott vs. United States, 130 Fed. 429	20
Smith vs. State, 41 Ohio App. 64	13
State vs. Asal, 79 Mont. 385	31
Tucker vs. State, 170 Ark. 143	30
Twining vs. United States, 141 Fed. 41	31
United States vs. Booker, 98 Fed. 291	31
United States vs. Brewer, 139 U. S. 278	15
United States vs. Eqe, 49 Fed. 852	31
United States vs. Fish, 24 Fed. 585	20
United States vs. Herrig, 204 Fed. 124	31

TABLE OF CASES CITED—Continued

Page

United States vs. McClarty, 191 Fed. 518 31
United States vs. McClarty, 191 Fed. 523 31
United States vs. Noveck, 271 U. S. 201 15
United States vs. Scharton, 285 U. S. 518 15
United States vs. Shelton, 2 Wheat. 119 15
United States vs. Weitzel, 246 U. S. 533 15
United States vs. Wiltberger, 5 Wheat. 76 15

TABLE OF STATUTES CITED

Act of Cong., Mar. 4, 1909, c. 321, sec. 332 (U. S. C. title 18, sec. 550) 16, 17, 31
R. S. Sec. 5209, as amended (U. S. C. title 12, sec. 592) 31

TEXT BOOKS AND ENCYCLOPEDIAS CITED

Bishop, Statutory Crimes (3 Ed.) secs. 191-194, 199b-220 ..... 13, 14
1 Clark & Skyles, Law of Agency, sec. 520 16
2 C. J. S. Agency, sec. 12 17
43 Harvard Law Rev. 689, Sayre "Crim. Responsibility for Acts of Another" 17, 18
1 McLain, Crim. Law, sec. 188 17
Wharton, Crim. Law, (12 Ed.) sec. 241, 265 ..... 18, 28
Wharton, Hom. (3 Ed.) 76 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 329

THE UNITED STATES OF AMERICA, *Petitioner*

vs.

JOHN J. GILES

BRIEF FOR RESPONDENT

CORRECTING PETITIONER'S STATEMENT

The entries charged to have been made by respondent were not made by him. He did not cause them to be made. They were not made by his direction. They were not made by anyone over whom he had authority, direction or control, nor with whom he had contact. They were not made in his presence, actual or constructive. He did not aid, abet, counsel, command, induce nor procure the making of them, nor either of them. They

were not made pursuant to any conspiracy, express or implied, between him and the entrants. He was not cognizant of the making of the entries, when made. He took no step to induce the making of the entries. Nothing *he* did *caused* the entries, nor *any* entry, *to be* made. They were not made as a result, nor in consequence, of any act of his, but were made, rather, by bookkeepers acting independently of him, as a result, and in consequence, of withdrawals on that day from, and deposits in, the customers' accounts,—of checks drawn on, and paid out of, and hence deducted from, the accounts, thus reducing the "old balances", and of other deposits than those in question made in one of the accounts, thus augmenting it.[1] The withholding of the deposit slips, therefore, occasioned no entry, the entries having been made by the respective bookkeepers in consequence of withdrawals and deposits in the one account, and withdrawals in the other, of which withdrawals and deposits so causing the entries in question it is not alleged, nor shown, nor claimed, respondent had knowledge. The entries in question were

---

1. See R. 19, Ex. 4, which shows the "old balance" in the Public Service Company account was reduced $284.09 by ten checks charged to and augmented $2585.15 by two deposits in, that account, thus occasioning the entry of the new balance of $7874.07 (the entry charged in third count, R. 4), instead of the old balance of $5573.01. See, similarly, R. 20, Ex. 5, account of Insurance Company, where five checks, amounting to $278.41, were drawn against that account, thus occasioning the new balance entry of $1199.66 (charged in fourth count, R. 5) instead of the "old balance" of $1478.07, at the beginning of the day. The exhibits show, what is common knowledge, that no new balance is struck, hence no entry made, on days when no change occurs in last previous balance.

made, respectively, by two of the bank's bookkeepers,—one who kept the individual ledger sheets including the letter "N", and hence made the entries in the account of National Life and Accident Insurance Company, and the other who kept the "S" sheets, including San Antonio Public Service Company account. (R. 18).

As conceded in the Petition, p. 4, and Petitioner's brief, P. 51, "there is no dispute as to the facts". As was correctly stated by Petitioner in its Bill of Particulars (R. 19), in relation to each false entry count, "the *act committed* by defendant - - was the *withholding* by him and the *failure* by him *to turn over* to the Bookkeeping Department in the usual course of the bank's business, a deposit slip"—though it was there erroneously concluded this act of omission "caused" the entries to be made,—which it did not.

Respondent was one of three paying and receiving tellers for the bank (R. 22). On July 25, 1933, as such teller, he received a deposit of $1985.79 by San Antonio Public Service Company (R. 13), and a deposit of $663.37 by National Life & Accident Insurance Company (R. 15). He correctly turned the proceeds into the cash drawer.

He made the correct entries in the customers' pass books. Instead, however, of placing these two deposit slips in a drawer, whence, as was the custom, persons from the bookkeeping department of the bank would get them and convey them to the bookkeepers, respondent placed these two slips in a cigar box on top his desk, wherein he kept odds and ends, expecting to place them at a later date

in the drawer from which they would be conveyed to the bookkeepers. (R. 53-54,59).

The foregoing comprehends the whole of respondent's acts in relation to the transaction.[1]

The reason why respondent placed the two deposit slips in his cigar box, and omitted to place them in the drawer from whence they should be conveyed to the bookkeepers, was that his cash was short by approximately the sum of these two deposits, and by withholding, but only by withholding, these two slips he could balance his cash. (R. 54).

While unnecessary to the point to be decided, the shortage in his cash was not due to any fault of respondent.

---

1. Respondent testified, without dispute (R. 53-54):

"The bank got the money for both of those deposits. I did not make any false entries with reference to those items. It is true that all I did was simply put the deposit slips in the cigar box and withhold them for the time being, until I could recover the shortage. I did not make any report to any bookkeeper or anything of the kind, nothing to report to the bookkeeper. As to how the bookkeeping department received its information on which they keep their books, the bookkeepers came in three or four times a day and lots of days oftener, and took the deposit tickets and checks out of the drawers. The business of the day was represented by the tickets and checks. I would put those in the drawers; I had a special drawer for them, divided into sections. As to whether I took them to the bookkeepers or they came to the drawers whenever they wanted to get them,—they came and got them whether I was there or not. I had no control

The first two counts charged him with embezzlement of the sum of these two deposits (R. 1-3), but the shortage was explained, without dispute, to have occurred through successive instances of packages of bills having been taken from his cash without his knowledge or connivance, and, fearing to lose his job, he committed the blunder of deciding not to report the loss, but to cover the shortages by temporarily withholding, from time to time, the deposit slips of customers until he could either recover the missing cash or make good the shortage (R. 47). Following shortly the two deposits in question, the bank failed, and he thereupon reported the fact of the shortage and paid it in full,—in part borrowing from relatives with which to do so and selling his home to pay the balance (R. 48-49). In brief, by the undisputed facts, respondent was not at fault in relation to the shortages; and the jury acquitted him of

---

or direction whatever over the bookkeeping department or any bookkeeper. - - If the entries were made on any given date showing the balance of any depositors, etc., I did not have anything whatever to do with making the entries, or causing them to be made. They simply came to the drawers and got the checks and deposit slips, and from that made up their entries.

"These two deposit slips that were withheld and stuck in the cigar box that day would have gone right on into the books in time if the bank had not closed. * * * They were simply withheld that way to make my cash balance, that was the only way I had of doing that" (R. 60): "I did not make any entries or figures of any sort from which the bookkeepers might have got it off the entries. The only entry I ever made was in the depositor's pass book. I therefore made no other entries."

the charges of embezzlement, but, required by the court's charge[1], convicted on the false entry counts (R. 73).

SUMMARY OF ARGUMENT FOR RESPONDENT

The law of the case, as counsel for respondent conceive it to be, is:

1. The facts fail to sustain Petitioner's claim that respondent "caused" the entries to be made. *Per contra*, they were made independently of him, and of, but despite, his act in withholding the deposit slips. They were made as part of the system, and routine, in consequence of changes in the "old balances" in the respective accounts of Public Service Company, and Insurance Company, due to withdrawals and additions (checks drawn on both accounts and deposits in the one); and both entries would have been made had Giles not received, nor withheld, the deposits. Nothing Giles did caused the entries to be made. The most to be said is that what Giles did may, through sequent circumstances, have *contributed* to the falsity of the entries, as thus made independently of him; but he did not *cause* the making. His act is not covered by the statute, which penalizes only him "who *makes* any false entry". —and the rules for construction do not admit of such extension of the plain words of the statute as would be

1. The Court charged (R. 67):

> "If the defendant - - by concealing or suppressing deposit slips - - with knowledge - - that by his affirmative act in so concealing these deposit slips he would cause the bookkeeper to make an erroneous and false entry - - then you would be warranted in finding that he caused the false entry."

required for inclusion of his undisputed act of withholding the deposit slips.

2. Since Giles did not make the entries, nor cause them to be made, but they were made independently of and without regard to him or to his act in withholding the slips, he was not principal to the making, neither as having aided, abetted, counseled, commanded, induced nor procured the making, nor under the "innocent agent" doctrine; and since the *making* of false entries, and *not* the *causing to be false* of entries independently made by others, is the thing the statute, by unambiguous language, penalizes, Giles' act is not within the statute.

3. One who does not himself make the entry may not, under the statute—which punishes only him "who makes any false entry"—be convicted except he be principal with him who made it. No doctrine known to our law, other than the *law of principals*, warrants conviction of one for an offense actually committed by another; and respondent was not such principal.

4. The "innocent agent" doctrine, being but part of the law of principals, may not be so far extended as to make penal under this plain statute an act or omission on part of accused which, at most, but contributes to, or causes, the *falsity* of the entry, but to the *making* of which accused was not principal. Neither will the "omission to prevent a foreseen consequence" theory avail to uphold conviction.

5. The "well recognized principle of intended causation", sought to be applied by Petitioner, while recognized as the true principle on which criminal responsibility rests,

is nothing more than a recognition of the law of principals, and does not extend, but is limited by, that law; and barest recital of the undisputed facts demonstrates there was no "causation", intended or otherwise, of the "making of any entry" in respondent's withholding the deposit slips.

6. The Circuit Court of Appeals for the Fifth Circuit was right in reversing the judgment.

DISCUSSION

The first, and fundamental, fault with Petitioner's argument is factual,—it erroneously assumes respondent "caused" the *entries* in question *to be made*. The facts do not justify, but repel, the assumption.

Giles, as teller, received two deposits by regular customers, but, instead of depositing the two slips evidencing the deposits in the drawer from whence the bookkeepers would receive and record them, withheld them. That is the sum total of his acts in relation to the matter under inquiry.

In consequence, the bookkeepers failed to receive these evidences of the two deposits. Instead of this causing them to make entries, it would have obviated any entry by them. His act, so far from *causing* entry, had just the opposite purpose and effect,—it prevented entry relating to the transactions he dealt with. If this were all, the "old entries" might have stood indefinitely,—at least until Giles should turn in the withheld slips, and they should thence reach the respective bookkeepers. However, other causes intervened, requiring entries. The Public Service Company drew ten checks against its account, which came in and were paid, reducing their "old balance" by an aggregate of

$284.09. It also made other deposits (other than and distinct from that which Giles withheld) amounting to $2585.15. Thus, by acts of this depositor, separate and distinct from the act with which Giles was concerned, the "old balance" of $5573.01, which remained to that depositor at the end of July 24, was augmented by other deposits on the 25th amounting to $2585.15, and reduced by checks amounting to $284.09; and this necessitated a new balance entry at the close of the business day of July 25, in that account. So, taking the balance of the previous day, adding to it the two deposits which came to him from the customer on that day, and deducting the withdrawals, the bookkeeper of that account made the entry in question, of $7874.07. There is neither evidence nor intimation that Giles was concerned in or knew aught of this,—of either the deposits, or withdrawals, or entries. By the same process, as part of the same systematic routine, and as a result of the day's withdrawals in the account of National Life & Accident Insurance Company, deducting the aggregate of checks charged against that account that day, the bookkeeper working on that sheet of the ledger made the entry in question in that account,—Giles having nothing to do with the withdrawals nor resultant entry.

Had there been no withdrawals in the last mentioned account, and no checks on nor deposits in the former, neither new entry would have been necessitated, nor made. But for these resultant changes in the balances of these two respective depositors, occasioned by withdrawals and deposits, all wholly independent of anything Giles did, neither entry would have been made. The balances otherwise would have stood as of the day previous. The "old balances" of July 24 might have remained without change, and no new entries made, for indefinite period, but for

these acts, by way of withdrawal and deposit, on part of the respective depositors. Otherwise, these old balances, these identical entries, might have remained until the bank closed and no entries made after July 24. Had it continued business, they might have remained until they became dead accounts, and the sheets removed thereto. This is not only indicated by the ledger sheets themselves, but is matter of most common knowledge. New entries are not made in existing depositor's accounts until and unless a change occurs in the account, by depletion or augmentation, necessitating the change. But by these independent and subsequent, intervening acts, in each instance, the changes were necessitated, and the new entries made. Did Giles cause these new entries? Did Giles cause the depositors to make withdrawals, or the one to make deposits,—wholly independent of the slips which he withheld? Did Giles even know of these extraneous withdrawals and deposits? Does allegation or proof indicate any such knowledge by, or notice to, him? How, then, could he have "caused" the new entries, which were made entirely independently of his act in withholding the slips evidencing the deposits he received? How was he to know that, before he should turn in the two slips he temporarily withheld, independent, intervening acts should be done by the depositors themselves, which should change their balances, and that in consequence the entrants, the bookkeepers, should make new entries? Is it not, therefore, plain, beyond cavil or controversy, that Giles' withholding the evidence of deposits he had received did *not* cause the entries in question, but that they were caused in consequence of the intervening acts of depositors themselves,—the one in making other deposits, and both in making withdrawals?

The matter can be reduced to simplest understanding by the following parallel:

A and B are tellers in the bank, C a depositing customer. At the beginning of today's business C has on deposit $500.00,—his "old balance". On this morning C deposits through A, $100.00. A accepts the deposit and places the $100.00 entry in C's pass book; and puts the $100.00 into the drawer with his cash, but instead of putting the deposit slip into the drawer where the bookkeepers would get it, A withholds the deposit slip,—puts it in his pocket. Now, this withholding, of course, causes no entry by the bookkeeper. To the contrary it *prevents* an entry: because the bookkeeper, not having the information to the effect that C's balance has been changed, will let the old balance entry stand. If this were all, the "old balance" would stand indefinitely. But C, by other and independent acts, does cause a new entry. That is, later in the day he goes to B, the second teller, and presents his check for $50.00, thus depleting his balance by that sum. We will say, too, that still later in the day C goes back again to B, and deposits $500.00, thus augmenting his account by that sum. B reports the two transactions to the bookkeeping department. In consequence of the withdrawal and deposit through B, D (a bookkeeper handling that account) thereupon records the $50.00 withdrawal, and the $500.00 deposit, and enters, as C's new balance, $950.00, thus making the new entry.

If we know anything of cause and effect—"the well recognized principle of intended causation"—we know that what caused this new entry were C's withdrawal and deposit through B, the transmission of the fact to D, and D's figuring up and doing his duty of making the new balance entry accordingly,—in none of which A had a part. We know that A's withholding the $100.00 slip *did not cause the making* of the new balance entry. The *very*

most which may be said of A's withholding the $100.00 deposit slip is that, in consequence of it, D's entry did not reflect the true amount of obligation of the bank to C, and, therefore, that A's act, in the sequence of events, *resulted* in the *falsity* of D's entry—even if that much may be said; *but it did not cause D* to *make* the entry.

This false factual assumption on the part of Petitioner that Giles "caused the making of the false entries" lies at the base of counsel's whole argument. With this error exposed, nothing remains to Petitioner.

Neither is it true, as the above example illustrates, that Giles "knew that false entries would result" from his withholding the deposit slips. What did he know of the checks against the account?—or the other deposits in the one? Certainly no proof indicates such knowledge; and if that knowledge is to be argued against him, it ought to have been proved. It is certainly not inferable from the circumstances in evidence. All that is shown is that during the day, additionally to the two deposits made through Giles, the two depositors depleted their balances by checks and one of them added to its by other deposits. There is no indication Giles handled any such checks or deposits, or knew aught of them. He was only one of at least three receiving and paying tellers. We cannot *presume* he knew that these depositors, or either of them, would in the interim draw against their account, or make other deposits, before he should report the deposits made to him, or that he knew they had done so on the day in question. This would be to presume, without proof, against him, rather than in his favor. So, if that be important, it is not true to say he knew even that the entries would result.

But even if we might suppose, or presume, Giles did know the withdrawals, or deposits, or both, would occur, or had occurred; and suppose further he knew false entry by the bookkeeper would result,—that still is not sufficient.

> "The mere concealment of the knowledge that a felony is to be committed, however, will not make the party concealing it an accessory before the fact; nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offense." Wharton, Hom. (3 Ed.) p. 76; Smith vs. State, 41 Ohio App. 64; Lewis vs. State, 119 Tex. Crim. Rep. 265;

It of course cannot avail to say respondent knew, or should have known, that in consequence of his withholding the slips the entries might or would be made by the bookkeeper,—that *would not make him principal*, but would be to impute to him criminal responsibility for the innocent, subsequent, independent act of another, in his absence, which he did not cause nor direct, and which this statute does not cover, and no rule of construction admits.

Familiar as is this Court with the rules for construction of penal statutes, it will not be amiss, at the outset of the inquiry whether the act of Giles is within the statute which punishes him, and him only, who "makes any false entry", to have before us an expression of those fundamental rules:

Mr. Bishop, in his Statutory Crimes, (3 Ed.) Secs. 191-194, 199b-220, reminds us (Sec. 191) our courts are not justified in interpreting *what needs no* interpretation. He next well says (Sec. 192) that the law itself deems such penal statutes

> "odious, not as being unnecessary, but in the sense in which a father feels it odious to inflict needful chastisement on a child; and, on the other hand, there are things in which the law delights. To things odious is applied the strict interpretation; to things favored, the liberal: as a father, in chastising his child, would keep within the necessity of the case to the letter; while, in bestowing a merited reward, he would cast in something also from affection".

And (Sec. 196) that

> "While the parts of a penal statute which subject to punishment, or a penalty are, from their odious nature to be construed strictly, those which exempt from penal consequences will, because of their opposite character, receive a liberal interpretation".

Then, under his rules for construction, he says (Sec. 216):

> "The words of a penal or other statute requiring a strict construction must not be extended beyond what they will fairly and reasonably bear."

And, (Sec. 218) as his 5th rule,

> "If, in a criminal case requiring the strict construction of a statute, the court entertains a reasonable doubt of its meaning, this doubt will prevail in favor of the accused".

And, as his 6th rule (sec. 220):

> "In strict construction, no case is brought within the statute unless completely within its words".

These rules of construction are recognized, we think, without exception, by this Court.

United States vs. Sheldon, 2 Wheat. 119, 121;
United States vs. Wiltberger, 5 Wheat. 76, 96;
United States vs. Brewer, 139 U. S. 278;
United States vs. Weitzel, 246 U. S. 533;
United States vs. Noveck, 271 U. S. 201, 204;
Fasulo vs. United States, 272 U. S. 620, 628-629;
Prussian vs. United States, 282 U. S. 675, 677;
United States vs. Scharton, 285 U. S. 518, 521-522;

Cases might be multiplied. Briefest composite expression of the rules applied in those decisions, cited supra, may be said to be:

> "Familar rules require that these criminal statutes shall be construed strictly". "It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of the statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity or of a kindred character with those which are enumerated". "Laws which create crime ought to be so explicit that a man subject to their penalties may know what acts it is their duty to avoid". "Before a man can be punished his case must be plainly and unmistakably within the statute". "Words may not be extended beyond their natural meaning in order to create an offense by construction merely". "If there has been a failure to provide for the state of case developed by the record, Congress alone can supply the omission". "A strained construction is inadmissible". "Statutes will not be read to create crimes or degrees or classes of crimes, unless the purpose so to do is plain". "There are no constructive offenses. Before one can be punished, his case must be unmistakably within the statute".

Expressions of like import might, too, be multiplied.

In Cochran v. United States, 157 U. S. 287, in considering this statute, this court correctly said "*the penalty is affixed to the false entry*". Plainly, this is so; for the statute, in plain language, levels its penalty at him "*who makes*" the false entry. That is, one, before he may be punished, must either have *made* the entry, or be *party* to its actual *making* in such way as that the application of some known principle of law makes him answerable for it. And here we make bold to assert there is no known principle or doctrine of law under which one may be found guilty of a crime he did not himself actually commit, save the law of principals. (We mean to include a conspirator as a principal; but there is, of course, no conspiracy in the case being considered. We, of course, include accessories and accomplices as within the law of principals, as our Federal statute, Act of Congress, Mar. 4, 1909, c. 321, Sec. 332, 35 Stat. 1152, U. S. C. Title 18, Sec. 550) abolishes the distinction and makes all guilty participants principals. We treat too, the "innocent agent" doctrine as part of the law of principals).

Aside from the "innocent agent" doctrine, there is no such thing as "criminal agency". It is a misnomer. It does not exist. It "connotes" nothing, but a failure to understand the law of principals.

In 1 Clark & Skyles, Law of Agency, Sec. 520, "Criminal Liability of Principal for Agent's Acts" it was early said:

> "The true ground of the principal's liability, in those cases where he is held criminally responsible for the acts of his agent, is not because of the relation of principal and agent, for as has been seen in an earlier part of this work, an agency can not be created for the

purpose of committing illegal or criminal acts, but is on the ground that the principal in the particular case is a principal or accessory to the crime by in some way being privy to or participating in it. As has been said: 'strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offenses are either principals or accessories' ".

2. C. J. S. Agency Sec. 12: "One cannot be an agent in the commission of a crime - - There can be no agency in the perpetration of a crime, misdemeanor, or any unlawful act, and all parties participating therein are principals".

Cf. 1 McLain, Crim Law, Sec. 188.

U.S.C.Title 18, Sec. 550, says: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal".

In 43 Harvard Law Review 689, Sayre, in his article on "Criminal Responsibility for the Acts of Another" (dealing with the development of the civil doctrine of respondeat superior, and the criminal law concept of vicarious responsibility) said (P. 719):

"Criminal liability in the case of all true crimes should be based exclusively upon causation (P. 723). Criminal liability, being essentially personal and individual, has always depended upon proof of individual causation. Hence the criminal law has never accepted the doctrine of respondeat superior, which is a form of liability without fault and outside the ordinary principles of causation".

He quotes (P. 700), from Rex vs. Huggins, 2 Strange 882, Raymond, C. J.,

> "It is a point not to be disputed but that in criminal cases the principal is not answerable for the act of the deputy as he is in civil cases; they must each answer for their own acts, and stand or fall by their own behavior. All the authors that treat of criminal proceedings proceed on the foundation of this distinction: that to affect the superior by the act of the deputy, there must be a command of the superior".

If with my guilty participation another commits a crime, understanding he is doing so, I am principal to that crime. If I cause him to do it, and he is innocent of, and knows not, my *mens rea*, he is my innocent agent, and I alone am guilty,—as principal. But in the latter case my act must have accomplished the completed crime. "Presence is not necessary when causal connection is immediate, e. g. when agent is irresponsible." 1 Wharton, Cr. Law (12 Ed.) Sec. 241. I must have been throughout the directing force. My innocent agent, whether an innocent human being or an insensate mechanism, must have done my bidding, and thereby accomplished the crime my *mens rea* intended. And there must be "*immediate causal connection between the instigation and the act*". 1 Wharton, Cr. Law (12 Ed.) Sec. 265. And the innocent agent must not have committed some crime other than I instigated; and neither am I guilty if what I directed *results*, in consequence, in some *other*, or different, crime. Whart. Crim. Law, supra. If I, designing to steal shopkeeper Schmidt's jewels, send my little grandson, or secretary, to Schmidt's shop with direction to pick up there, and fetch to me at my office, a certain red plush jewel case, and he innocently obeys and executes my direction, and I thus appropriate Schmidt's

jewels, I, but I alone, am guilty of the theft. I alone cause and accomplish the larcency. This is "intended causation", as expressed in the "innocent agent" doctrine. Or, if my emissary be my confederate, and share my *mens rea*, we are both guilty, as principals. If my guilty confederate commit the act, but I, sharing the *mens rea*, aid, abet, counsel, command, induce or procure its commission, I am principal with him. But if, in *consequence* of my theft, either through my innocent agent or guilty confederate, Schmidt should commit suicide, or his partner should kill him, over the loss of the jewels, I am not guilty of murder; and no more is Giles guilty of false entries which he did not make, and was not principal to the making of, albeit his withholding of the deposit slips may, in the sequence of events, have *resulted* in the *falsity* of those entries.

Inspection of every decision which has upheld conviction for false entry under this statute, where the accused was not himself the entrant, will make plain the fact that he was principal with the entrant or else sole principal. In the Morse case, which, as is manifest from the fact of Petitioner's reliance on it, marks the high tide of what we may term "construction" of the statute, Morse was principal to the entrant. He was executive officer and active head of the bank, his secretary and the bookkeeper directly under his control. It was in furtherance of his own scheme to defraud and conceal, and at his own direction, the false entries were made. He had the secretary execute a sham note, and the bookkeeper to enter the transaction as a loan, when in fact it was, as he knew, a speculative purchase of stocks, in violation of law. He planned and directed the whole transaction and it was by his express procurement and direction the false entries were made. The court said, since he did not make the entry, it must have been made

by his *direction* and procurement,—which the jury, on what was held to be sufficient evidence, found it was. He was clearly principal.

In the Richardson vs. United States, 181 Fed. 1 cited by the Government, accused cashier directed his clerk to make the entry. The court found the entrant in making the entry, to have been "acting under the direction of the defendant," he was principal.

Most of the decisions, where the accused was not the actual entrant, expressly rest the affirmance on the ground the accused was principal,—such, for instance, as the cases of Kettenbach vs. United States, 202 Fed. 377; United States vs. Fish, 24 Fed. 585. In some cases, as for instance Scott vs. United States, 130 Fed. 429, perhaps with less care, in referring to the facts showing principalship, the courts quote the familiar maxim, *qui facit per alium facit per se*. This maxim is but the *fundamental principle of civil agency*. It is not a doctrine. It is but a short and familiar way of expressing, so far as criminal law is concerned, the fact of principalship,—that the accused procured the entry to be made, or act to be done, and is, hence, principal to its commission. A bank president devises a fraudulent scheme, puts through, by the use of sham documents a false transaction, and causes his underling, the bookkeeper, to make the entry on the books. We may, a bit carelessly, apply the terse latin maxim; but we *should* more accurately say, in referring to criminality, he is *principal*.

We respectfully suggest that, since Respondent did not make these entries, he must be shown, and held, to have been principal to their making, else the conviction cannot stand,—that the law affords no other vehicle which will

uphold or convey to him the crime of him who actually did it.

It will be unnecessary to argue to this court, what is too fundamental to require discussion, that Giles is not, in law, a principal with the entrants in this case in the sense of having aided, abetted, counseled, commanded, induced or procured the entrant to make the entries. To contend that he was so would be to reflect on the intelligence of the criminal lawyer. In the first place, it is not claimed, and cannot be, that the entrants were themselves guilty of the offense. This fact alone wipes out all principalship, except the innocent agent doctrine, where the accused must be sole principal. This was doubtless true in the Richardson case, supra, where the court said the entrants *may* or *may not* have acted with guilty knowledge, but that the case did "not turn upon that point", as in either event Richardson would be guilty,—as having directed and acted with the entrants, if they were guilty, as having solely accomplished the crime, and had immediate causal connection with it, if they were innocent.

With the innocent agent doctrine understood, it would appear equally unnecessary to argue that Giles is not guilty of the false entries as the directing force in, as having himself accomplished, the making of the entries. It is unnecessary to say, Giles did not in fact "instigate" the making of the entries in question, much less that there was *no immediate causal connection* between his withholding of the slips in his possession and the making of the entries, induced by other independent causes. What was said at the beginning of this discussion manifests that whatever may be said of Giles' withholding having, in the sequence of events, conduced to the entries later made *being false*, his act did

not *cause the making* of the entries themselves. To hold him guilty, under this statute, of *making* the false entries, we would have to shut our eyes to the facts, and to all principles on which the law of Principals, in the innocent agent doctrine, operates, and say, against undisputed fact, that his act was the directing force throughout in the actual *making* of the entries (regardless of the fact of their falsity); that he was solely the directing force in making the entries; that there was *immediate causal connection* between his withholding the slips,—which looked only to preventing entries—and the subsequent independent making of the entries by persons he in no degree directed, but who in fact made them as a result of the customers balances having been changed from causes wholly foreign to and outside of the negative act of Giles, which contributed not one whit to the making of the entries, but only to their incorrectness, or falsity, when later made, and which were made *despite his act* looking solely to the *prevention* of the entry.

The fallacy, we repeat, in the arguments for petitioner lies in the fact the reasoning is applied to the wrongful character of respondent's act in withholding the slips, rather than to what the statute penalizes, and to proper construction of that statute. One may conceive a variety of acts by bank officials and employees, which may result in false entries, which are not punishable under this false entry statute,—

> "gross maladministration and inexcusable breach of duty on the part of its officers in the management of a national bank, however disastrous such conduct may be to its stockholders, are not punishable unless they come within the provisions of Section 5209 of the

Revised Statutes (U. S. Comp. St. 1901, p. 3497). The Supreme Court, in United States v. Brewer, 139 U. S., at page 288, 11 Sup. Ct. 541 (35 L. Ed. 190), though alluding to another enactment, announced the applicable principle when it said that 'Before a man can be punished his case must be plainly and unmistakably within the statute.'" Prettyman vs. United States, 189 Fed. 30, 34.

The error of Petitioner's arguments may be variously shown:

1. They overlook, what is obvious and well decided, that the penalty imposed, the thing punished, by this statute is the *making* of the entry,—the making itself, not the doing of, or omission to do, some act which may *result in rendering false* an entry subsequently and independently made by another, the entry itself being caused or induced by independent acts,—nor even the doing of an act which may *conduce* to, *or result in*, the making of the entry itself by another,—which latter, however, Giles did not do, as we have seen.

2. They go on the false premise the act of Giles "in deliberately withholding" the deposit slips is an "affirmative act", within the meaning of those well considered decisions which hold the accused must have acted affirmatively in directing the entrant in the making of the entry. This latter erroneous assumption was what misled the trial court in his charge. Giles' "affirmative act" of placing the deposit slips in the cigar box, withholding them from the depository where one from the bookkeeping department would have gotten them and carried them to the bookkeepers, and who would in turn have entered them on the ledger, was *not* an affirmative act, in the sense of the

principle which requires his act to have been an affirmative one in the way of directing the entry. To the contrary, the withholding of the slips was but a negative act. It had no *affirmative relation* to the making of the entries. It is a gross misconception to say this was tantamount to an affirmative direction to the bookkeeper. It was the omission, the declination, the refusal, to say anything to, communicate with, or direct, the bookkeepers. It was but an omission, a failure, to do what he should have done. As well might it be said had Giles gone to sleep at his desk, and thus failed to place the slips in the drawer where they would be gotten by the bookkeepers, he had thereby "affirmatively directed" the hand of the bookkeepers in making the false entires. To insist that Giles' act was affirmative amounting to a direction to the bookkeepers to make the false entries, is to reverse what Giles did. And to argue in the next breath that even if conceded to be an "act of omission", it amounted to an intentional causing of the entries to be made, and then to say this would not be true in case of accident, neglect, or unintended causation, is indeed the height of sophistry. The reasoning is palpably wrong. What Giles did was negative, not affirmative, omission, not commission, in relation to making the entries, and looked to preventing, not to making, and could by no possibility have caused the *making*, of the entries.

3. The argument erroneously assumes the withholding of information, which would prevent entry as the result of the withholding, was the *making of the entry*. In its worst possible light, it related and conduced only to *the falsity* of entries, if and when, through independent cause, they should be subsequently and independently made by others. We repeat, in view of the subsequent withdrawals and deposits, the bookkeepers would have *made their entries*

whether Giles *reported or withheld* the slips he had. They would have made their entries if the deposits had not been made; or if Giles had lost his slips, or forgotten the fact of the deposits, or fallen asleep and failed in his duties; or if another had stolen the slips from the drawer after Giles had placed them there; or if for any other conceivable reason the slips had failed to reach the bookkeepers. Of necessity, therefore, the entries were made independent of Giles and of any act of his, and without relation to the fact his omission conduced to their falsity. In short, Giles' act, in the sequence of events, and in view of the acts of others depleting and changing the balances, which caused the entries, did no more than to conduce to their *falsity* when finally, independently made, and to the making of which he was not party or principal, and to this only. But the offense lies in the *making* of an entry which is false, *not* the *rendering false* an entry to be made by another. If this were not so, an employe who should embezzle whatever sum during the business day, and thereby in a series of sequences render false an entry later independently to be made by a bookkeeper, in entering the amount of cash on hand at close of business, would be guilty of false entry,— and this notwithstanding he had neither contact with, direction of, nor anythig to do with, the bookkeeper who should make the entry. A purloining porter, who should steal a dollar from the cash, thus committing, and thinking only of committting, embezzlement (or theft by bailee) in taking the dollar, thus causing the bank's cash to be out of balance, must report his petty theft to the bookkeeper, and tell the latter to deduct the dollar when he goes to make his entry, else the porter would, by this remarkable doctrine of imputed principalship, have *made* a false entry. This would indeed be an absurdity sanctioned neither by rule

nor reason. This would be to read into the statute a provision it does not contain. Before such could be the case Congress would have to amend the statute to read in substance, that "whoever commits any act which may result in any entry thereafter made by another in the books of the bank being false, whether the entry itself be made by his procurement or not, shall be guilty of making false entry". Unfortunately for Petitioner, our statute in question is quite unlike, and falls far short of, the English statute construed in Reg. vs. Butt, 15 Cox C. C. 564, where Lord Coleridge, for the court, affirmed conviction of a clerk who collected one sum, and reported a lesser,—under a statute which makes him guilty of false entry who makes, or concurs in making, a false entry, or *omits* or alters, or *concurs in omitting* or altering, any entry, etc. The court said there it was immaterial the clerk was innocent of the falsity of the entry, as the prisoner either made or took part in the making of it, for sum materially less than he collected. There the statute expressly covered the *omission, and* the act of the accused was *affirmative*,—he was principal.

The illustrations given, and authorities cited, by the earnest dissenting Judge below, while plausible, are easily to be distinguished in principal and application. His premise, we respectfully submit, that "an omission to prevent a foreseen consequence which there is a legal duty to prevent may charge one criminally with that consequence", is, as applied to the facts here, faulty in two main respects:

(1) Giles *owed no legal duty* to *prevent false entry* from being made *by the bookkeepers*. The bookkeepers were not under his care nor direction, and the making of entries by them was none of his business. He owed the duty

to his employer to perform the duties of his employment. He owed a duty to put the deposit slips in question into the drawer whence they would reach the bookkeepers. That was the extent of his duty; and he failed in that duty. No statute penalizes that failure. But his duties did not comprehend that of preventing the bookkeepers from making false entries.

> "The bare neglect of a legal duty is not a crime unless some statute so prescribes". People vs. Watson, 154 Misc. 667, 278 NYS 759, 762.

A brakeman on a train was held not liable for the death of a child because he did not owe the duty, since the engineer and fireman held those duties. Anderson v. State, 27 Tex. App. 177, 182-3.

In Regina v. Conde, 10 Cox C. C. 547, the accused were guilty of murder in withholding food with wilful determination to thereby cause death; also their act in withholding *itself* accomplished, and necessarily accomplished, the very effect and end they sought,—the crime they solely committed, namely, murder. Similarly, in Regina v. Instan, 1 Q. B. 450, the circumstances created the legal duty to supply the food: and the withholding thereof directly accomplished the death. In each case there was *direct, immediate causal* connection,—the *acts of the accused*, in each case, accomplished the completed crime. The accused in each case were the immediate and sole directing force which accomplished the end conceived and intended in their *mens rea*. So it was in the Knowles case where the sea captain was claimed by the prosecution to have wilfully sailed away from the seaman who had fallen overboard, refusing effort to save him. What the Govern-

ment there was trying to establish was that this action of the captain directly caused, had immediate causal connection with, death, and was, hence, manslaughter. The contention may have been a bit farfetched, in the circumstances, and the jury evidently thought so. But the Government would have had no case to contend for had it been plain, as here, that the captain owed no duty to prevent the death, or that his act had no immediate causal connection with the death,—that there would have been no death but for the fact that other independent actors appeared on the scene and did the thing which caused death.

Nothing, either, in the sections of Wharton's Criminal Law, cited in the dissenting opinion, supports the conclusions there reached. On the contrary, the author there recognizes, and in his Section 265, quoted supra, adds pertinent caution to enforce the recognition, that there *must be* "immediate causal conection between the instigation and the act". He illustrates the point by the example that one is not responsible when causation is broken by the act of another. Here the withholding of the slips by Giles utterly lacked causation, so far as the making of the entries was concerned, and as well causation arose from other independent causes in which Giles had no part and over which he exercised no control.

(2) It is not true, in the light of the facts, that the making of a false entry was foreseen or was "a foreseen consequence" of Giles' withholding the slips. This is manifest from what we have hereinabove said. He knew his withholding would not cause an entry, because it suppressed the necessity, so far as the slips he withheld, were concerned, until he should turn them in; and to say, as

matter of law, that he foresaw that checks would be drawn against the account, or that other deposits would be made, before he could later turn in the slips, not only leaps beyond all proved fact, but both ignores causal connection and assumes against, and without, fact. No wonder the able author of the majority opinion and his concurring associate could not be led so far.

Again, wherein the dissenting Judge concluded the withholding of the slips was "purposeful, affirmative action", he misconceived the state of the testimony which showed the act of Giles, in withholding the slips had no affirmative relation to the making of the subsequent entries by the bookkeepers, but that the entries were made entirely without regard or relation to Giles' withholding, and from wholly different causes. This we have attempted to make clear hereinabove. It might be added had Giles changed or altered the deposit slips, after receiving them, and reported part only of one or both of the deposits, his would have then been affirmative action,—though grave doubt may even then be entertained whether it could be said he had made, or caused to be made, the entries. But at all events, what is overlooked in the minority opinion, the difference between inaction, or nonfeasance, and affirmative action causing the entries, is just the difference which makes one principal, or non-principal, to a crime.

One cannot be convicted of making false election return where he omitted to make return. Banner vs. State 44 Tex. Crim. Rep. 42.

Mere failure to disclose a fact does not constitute false pretense. There must be some affirmative misrepresentation,

by word or conduct. Tucker vs. State 170 Ark. 143. Blum vs. State, 20 Tex. App. 578, 592-595.

While no principle allows that the entrants here were agents of respondent, yet if we might so presume, that is not sufficient. Conceding the entrant to be an agent, yet

> " - - when made by an agent, they must be directly authorized or consented to in order to hold the principal, for authority to do a criminal act will not be presumed. 1 McLain, Crim. Law, Sec. 683. If a principal is liable at all criminally for the acts of another, such liability must be founded - - upon authorized acts". People vs. Green, 22 Cal. App. 45.

It is impossible to say that Giles' mere withholding of the slips had any immediate causal connection with, or accomplished the completed act of, making the entries with which he is charged,—to say he is principal, sole principal, to the making of these entries by the innocent bookkeepers: and we may be pardoned expression of the thought that to go so far afield would not only be to extend by construction a statute so plain and unambiguous as not to require nor admit of construction, but would be violative of all those great principles variously applying the rule of strict construction, above quoted, and the departure far more evil in its consequences than was the act of Giles which the prosecutor would have us extend this statute to include. If the claimed "lacuna", or "loophole" result, under the test of safe and established principles of construction, then, in the language of this court, "Congress alone can supply the omission", and application should be made there, not to this court.

We cite the following authorities, in particular, to support our position for respondent:

U. S. C. Title 12, Sec. 592;
U. S. C. Title 18, Sec. 550;
United States v. McClarty, 191 Fed. 523;
United States v. McClarty, 191 Fed. 518;
United States v. Herrig, 204 Fed. 124;
United States v. Booker, 98 Fed. 291;
Twining v. United States, 141 Fed. 41;
State v. Asal, 79 Mont. 385, 256 Pac. 1071, 1081;
United States v. Eqe, 49 Fed. 852, 853.

The decisions in the two McClarty cases, supra, are admitted by our esteemed adversaries to be in point, and to directly support our position. Your Honors will desire to read them with care for yourselves; and we shall not consume space to quote nor argue them here. The venerable District Judge who wrote those two decisions obviously gave the subject most earnest and exhaustive consideration. His conclusions there undoubtedly, in effect, are that the acts of respondent here are not within this false entry statute, and that to "hold otherwise, we must insert a clause in the statute which Congress omitted". If the venerable Judge Evans, instead of opinions extending through 200 volumes of our Federal Reports, had written but those in the two McClarty and Prettyman cases, they must have stamped him as a great lawyer and just judge. From all the American and English jurisdictions, Petitioner presents no case which supports its contention.

We respectfully submit that the Circut Court of Appeals was correct in reversing the judgment, and holding that the act of respondent is not made penal by, and his case therefore is not within, the statute.

Our thought throughout has been, and is, in reference to the sufficiency of the indictment, the phrase "caused to be made", may be treated as surplusage; that inasmuch as the statute, by express terms makes only him guilty who makes the false entry, an indictment should merely aver that an accused indicted under that statute made the false entry; and even though the Government might be unable to prove that the accused actually made the entry, if it succeeds in proving him to be a principal with the entrant, the case will have been made against him. Though foreign to our point, we deem it proper to state to the Court our view on that subject.

We cannot fail to conclude that respondent did not make the entries; that what he did did not cause them to be made; that he is not principal, either under the terms of our principal statute nor as having caused the innocent bookkeeper to make the entries; and in the state of the statute his conviction cannot stand.

For respondent, we respectfully pray that the judgment of the Circuit Court of Appeals be affirmed.

NAT L. HARDY,
WILL A. MORRISS,
of San Antonio, Texas,
Attorneys for Respondent.

Jan., 1937.

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 329

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

JOHN J. GILES,

Petition for Rehearing.

NAT L. HARDY,
WILL A. MORRISS,
San Antonio, Texas,
Attorneys for Respondent, John J. Giles.

LODOVIC PRINTING CO., SAN ANTONIO, TEXAS

TABLE OF CASES CITED.

Board vs. Rollins, 130 U. S. 662 8

Cochran vs. United States, 157 U. S. 287 3
Crooks vs. Harrelson, 282 U. S. 55 8

Denn vs. Reid, 10 Peters, 524 9

Fasulo vs. United States, 272 U. S. 620 9

Morse vs. United States, 174 Fed. 539 12

United States vs. Corbett, 215 U. S. 233 8
United States vs. Goldenberg, 168 U. S. 95 9
United States vs. Sheldon, 2 Wheat. 119 9
United States vs. Standard Brewery, 251 U. S. 210 9
United States vs. Weitzel, 246 U. S. 533 9
United States vs. Wiltberger 5 Wheat. 76 8

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 329

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

JOHN J. GILES,

Petition for Rehearing.

TO THE SUPREME COURT OF THE UNITED STATES
AND TO THE JUDGES THEREOF:

Comes John J. Giles, respondent, and presents this his petition for rehearing of the above cause, and, in support thereof, respectfully shows:

1. This Honorable Court erred in reversing the judgment of the Circuit Court of Appeals and affirming that of the District Court.

2. This Honorable Court erred in holding that under the facts proved the District Court did not err in denying respondent's motion for directed verdict of not guilty.

3. This Honorable Court erred in finding and holding that the entries in question in the individual ledger accounts were the necessary result of respondent's action in withholding the deposit slips.

4. This Honorable Court erred in holding that the statute which penalizes one "who makes any false entry" includes an act which does not cause entry to be made, but which causes merely the falsity of an entry when subsequently independently made by another.

Your Honors will not fail to accord to counsel utmost sincerity when we say the indulgence asked for rehearing is with no purpose of delay, but only in the most earnest belief we may manifest the grave errors we assert. It is to be admitted we have thus far failed to enforce understanding of our view of either the undisputed facts, or of the applicable law. But it will be conceded the novel and elusive question is such as to challenge the most painstaking consideration for correct conclusion, else we should not have contrary conclusion, after long study of the subject, by such able minds, expert in criminal law, as those of the author of the long accepted McClarty decisions, and of the majority of the Fifth Circuit. Convinced, therefore, that the conclusions reached and the interpretation put upon the statute, by this Court, are demonstrably incorrect, incompatible with accepted rule and precedent, and plain statute, we crave the most earnest consideration of what shall be said in this motion in fewest words we may employ.

The opinion is wrong, we respectfully submit, in the following controlling respects:

1. Wherein it holds the act of respondent, to-wit, "the withholding—and failure to turn over to the bookkeeping department in the usual course of the bank's business, a deposit slip," in consequence of which the uninformed bookkeeper innocently made his entry omitting account of the

withheld deposit, is within the statute which penalizes the *making* of false entry. Such holding not only reverses the statute itself, and makes it say what it does not express, but reverses as well the express previous pronouncement of this Court in construing the statute.

In Cochran vs. United States, 157 U. S. 287, in construing this statute, this Court thrice repeated its conclusion as to just what this statute penalizes, for the express purpose of making plain exactly the contrary of what the instant opinion holds. This Court there said:

> "The penalty imposed by section 5209 *is affixed to the one who makes* the false entry." "The *offense* is in *making* the false entry." "* * the penalty is affixed to the *making* of the false entry."

This means, can mean only, that the *offense* is in the *making* of an *entry which is false*,—the *making* is the thing denounced,—*not* the making *false* (rendering false) of another's entry. The statute is *not*, does not say, "any employe *who shall make* an entry *false*"; but rather, "who shall *make a false entry.*" This needs no argument to be understood, even if the Cochran decision had not made the definite and repeated pronouncement for the very purpose of enforcing recognition of the broad distinction. To cover the case of one whose act is *not* the *making* of the entry itself, but an act which *renders false* the entry made by another, we must read into the statute a clause which it does not contain, and which the Cochran decision says it does not mean,—which we know perverts and exactly reverses its meaning. Yet, by the instant decision, Your Honors say the offense is not in the making of false entry, but is in making *false* an entry—*rendering false* an entry—to be afterwards independently made by another. In other words, Your Honors now interpret the statute to say, or

include, "any employe who shall *be responsible* for the *falsity* of an entry made by another"; "any employe who shall *cause to be false* an entry later innocently made by another"; "any employe who shall do an act which shall *result in falsity* of an entry later made by another"—shall be guilty. Nothing short of so remarkable an interpretation can by possibility hold the act of respondent penal.

Let it be plainly understood we make no contention that to be guilty under the statute one must have personally made the entry. To the contrary, we are in accord with those decisions which hold that one who *caused* an entry to be made may be as guilty as if he had written it himself. But we say this is so on authority of the law of principals, and on no other doctrine; and this court has not attempted to say respondent is shown to have been principal in the making of the entries in question.

So, before we may uphold conviction, we must either find in the record as a fact that respondent did *more* than *cause another's entry to be false,*—that this statute positively does not cover—we must find he caused the *entry itself* to be made. Yet it is demonstrable the act of respondent in withholding and failing to turn over the deposit slip did *not* cause the *entry to be made,* but caused only the *entry to be false,* when it was later independently and innocently made by another. That his act in withholding the slips caused the entry, when it was later made by the innocent bookkeeper, *to be false* is an undisputed fact. But that he caused the *making* of the entry is denied, as is any conclusion assuming that he had any part in its making. What fact, we ask, can be pointed to in this record, to indicate that respondent did any act to cause or induce the bookkeeper to make these entries in question?—to procure or cause the entry of these balances, or any balance, by the "innocent intermediary" the bookkeeper? We repeat, no doctrine

known to the law of principals, whether the general statute, or the innocent agent doctrine, reaches him. Only one way can exist, and that, to leap beyond the statute, as written, and to find aliunde *unexpressed intention* to punish him who *makes false* an entry independently made by another with whom he is not principal, and whom he did not procure to make the entry, and thus to invert and emasculate and extend by unwarranted construction, this plain statute.

We apprehend the opinion does not intend to claim, as a fact, that he did more than merely withhold the silp, and hence caused the falsity of the bookkeeper's later innocent entry. It is demonstrable, as we shall see, he did not do more, and had no part in the making of any entry, but only in doing that which resulted in its falsity, when made by another.

2. The premise on which the opinion proceeds, that respondent's act in withholding the deposit slips was "action from which" the entry made by the innocent bookkeeper "necessarily followed", is an erroneous assumption. That no entry *necessarily* followed until such time as respondent should turn in the withheld slip is positively true to the record. The account of National Life and Accident Insurance Company, (R. 20 Ex. 5) the basis for conviction on the 4th count, will make this error plain. Respondent received a $663.37 deposit in that account, but, "failed to turn in" the deposit slip. The old balance in that account was $1478.07. We do not contend, as remarked by the Court, that the act of withholding this slip "prevented entry",—it did not "prevent", but it did "look to prevention" *of*, entry in that account. If another had not *done acts which did cause entry*, despite respondent's withholding the slip, no entry, of course, would have resulted or been made. But the depositor *did cause*, by drawing five checks on its account that day, the new entry. By these five checks it

reduced its account $278.41, and as a result the bookkeeper, deducting that sum, made the new balance entry of $1199.-66,—the entry which respondent was convicted for "making." So, unmistakably, *respondent* did not *make* the entry, was not present, nor in *any sense* concerned in either "making" or "*causing to be made*" the entry, but it was caused to be made by the depositor, in consequence of its withdrawals. What *caused the entry*, independently of respondent or of his act, was the act of the depositor itself. We surely do not need to repeat, the act, and *only* act, of respondent *tended only to prevent* new entry until he should turn in the withheld slips, and, therefore, if his act were all, the *old balance* would have stood unchanged, no new entry required nor made. Surely, it will not be doubted that thus the *entry in question*, in that account, was brought about, and made by the bookkeeper, from these withdrawals, and not by respondent's withholding a slip of which the bookkeeper knew nothing. Surely, too, it will not be erroneously understood, in the face of these disclosed facts, and of most common knowledge, that no new balance entry would have been made in the account on the individual ledger if the depositor had not depleted its account. Surely, it will be understood and accepted that new entries are not made, "old balance" entries *not changed*, in individual ledger accounts, save when change occurs in the deposit balance. So there can be no question but the acts of others, and *not any* act of *respondent; caused the entry to be made.* We attempted to make this clear heretofore; and we now assume the Court so understands, and does not erroneously doubt the *new entry* was occasioned by the withdrawals, but has written only in what we conceive to be the erroneous view that respondent, having by his withholding caused the entry as later made not to reflect the true amount of the account, and hence to be false, is to be held guilty of *making*

the false entry notwithstanding the admitted fact his act did not cause the actual making of the entry, but merely caused its falsity when independently made by the bookkeeper. We earnestly suggest, however, respondent and the profession are entitled to have the holding made plain, to have it plainly said respondent had nothing to do with the actual physical act of making the entry in the book, but that this was done in entire independence of him and of his act of withholding the slip, despite his effort to prevent entries by the withholding; and we ask the Court to make this undisputed fact plain. It should be said, the record demands it be said, in order that the holding may be understood, that the undisputed facts establish respondent had no part in and no connection with, and did not cause nor induce, the physical entry to be made, and hence was in no sense principal with the actual physical fact of making the entry; true, too, the statute, as plain from its context and well decided in the Cochran case, penalizes only him who *makes*, only the *making* of the entry; but, because the remote act of respondent caused the entry to be false, when thus independently made by one not principal, the rule of strict construction is to be abrogated or so far relaxed as to punish him whose act does no more than to contribute to or cause the falsity of the independent entry, in disregard of the law of principals, because of the unexpressed intention of Congress to protect bank records from falsification by employees. We submit nothing short of such an interpretation can uphold the conviction. Assuming this point is not misunderstood, we consider whether, with this fact of respondent's non-participation in, and non-causation of, the actual, physical making of the entry accepted, it yet may be said by any rule of interpretation he can be guilty of *making* the false entry denounced by this statute.

3. The broad assumption in the opinion that by this statute it was the legislative "purpose to insure the correctness of bank records by prescribing punishment" for one who "independently brings about their falsification" is quite unjustified by the wording of the act. If such was the purpose, it yet cannot warrant a reading into the act a clause which it does not contain, nor the interpretation of the act to mean what it does not say.

No rule is better settled by the decisions of this Court than that, in construing a statute, the

> "intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject." United States v. Corbett, 215 U. S. 233, 242.

The Corbett case is the case cited by this Court in its opinion as authority for the rule of construction; yet it says the intention "must be gathered from the words" of the statute.

> "To determine that a case is within the intention of the statute its language must authorize us to say so." United States v. Wiltberger, 5 Wheat 76, 96.
>
> "To get at the thought or meaning expressed in a statute—the first resort, in all cases, is to the natural significance of the words. If the words convey a definite meaning—then the meaning—must be accepted, and neither the courts nor the legislature have the right to add to it or take from it." Board vs. Rollins, 130 U. S. 662.
>
> "* * * to justify a departure from the letter of the law— the absurdity must be so gross as to shock the general moral or common sense—and there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." Crooks vs. Harrelson, 282 U. S. 55, 60.

Cf. United States vs. Weitzel, 246 U. S. 533, 543; Fasulo vs. United States, 272 U. S. 620, 628, 629; United States vs. Sheldon, 2 Wheat 119, 121; United States vs. Goldenberg, 168 U. S. 95; United States vs. Standard Brewery, 251 U. S. 210, 217; Denn vs. Reid, 10 Peters 524, 527.

4. The adoption by the Court, in its opinion, of Webster's tertiary and special meaning of the word "make" in no degree helps to include the undisputed act of respondent within the purview of this plain statute. The admitted sum total of respondent's act, in relation to the transactions, was that he withheld and failed to turn in the deposit slips, as above made plain. This act admittedly was the cause of the *falsity* of the entry subsequently made by the uninformed bookkeeper. As above stated, however, it should be made plain in the opinion, that the scope of the statutory construction may be understood, that respondent had nothing whatever to do with the actual *making* of the entry,—neither had nor attempted authority nor direction over the bookkeeper, was not present and had in no manner contacted nor communicated with the bookkeeper who made the entry; that the act of respondent had neither the purpose nor effect of causing the physical entry to be made, but it was caused by the depositor's acts of withdrawal, in consequence of which the bookkeeper made his entry. In brief, respondent's act did not cause nor induce the entry, but only caused it to be false, when made, independently of him, by another.

We would say the phrase "to make an entry in a book" is so plain, and its meaning so clear, it needs no definition. But, accepting the definitional meaning by the Court, that the word "make", as there used, means "to cause to exist, appear, or occur,"—to give it such definition adds no whit to the cause against respondent. In the light of the un-

disputed record, it may be irrefutably stated respondent did not "cause to exist" nor "cause to appear", nor "cause to occur," the entries in question, nor either of them. How could one cause an entry to exist or appear, or occur, in a book, when he did not write it, and nothing he did looked to or had the effect of inducing or causing the entry *to be made*, but whose remote act of withholding information did no more than to result in the *falsity* of the entry, when subsequently made? Surely, Your Honors will not doubt the act of respondent did no more than that. A study of the record, in the light of these suggestions, cannot fail to convince, as for instance the simple insurance company account, that the withdrawals, and they alone, caused the entry to be made, and that the remote act of respondent—"the withholding and failure to report a deposit slip"—merely contributed to, or caused, the *falsity*, not the *making*, of the entry.

It might be conceded that respondent's withholding the slip would necessarily result in the *falsity* of the entry, when it should be made, if made before he should turn the slip in. In withholding the slip, he ran the risk withdrawals might occur, and hence that entry might be made, before he should turn in the slip. But it certainly cannot be said the withholding *necessarily resulted* in the *making* of an entry by the bookkeeper. This is not technical. It is but factual and fundamental, as established in this record.

We earnestly ask, in the light of this indisputable fact, that the Court find and state the facts on this question, in order, at all events, that the scope of the holding may be understood by the profession and judiciary. Let it be plainly said respondent's act of withholding was not, in truth, the cause of the actual making of the entry, and had no connection with it, but that his act did no more than to cause the *falsity* of the entry, when independently made

later by the bookkeeper, and in the making of which he had no part whatever; and then let it be seen whether any principle of law will leap so far as to interpret this plain statute (which this court has so truly said, in the Cochran case, punishes him, and him only, who *makes* a false *entry*) as to penalize an act which may not be said to cause the *making* of the entry, but which only causes it *to be false*, when made by another.

We are thus brought, by undisputed fact, to the following conclusions:

1. Respondent's act of withholding did not *cause an entry* to be made. Its *only* effect was that it would cause the entry in the ledger account (if one should be made while the slip was withheld) to *be false*.

2. It did *not* necessarily follow, from his act of withholding, that an entry would be made. While, if one were made meantime, it would be false, *whether* it should be made would depend on *extraneous and independent* acts, *not* of *respondent*, but of the *depositor* and *bookkeeper*, both. If the insurance company should make withdrawals, that *would* cause an entry, provided the recipient should report the fact to the bookkeper, and provided the latter should do his duty. It did withdraw, and that did cause entry. Respondent, in withholding the slip, but took a chance, or ran the risk, that an entry *might* occur, before he should turn it in; and if it *should* occur, it would be false. But his act in withholding *could* not, and *did* not, cause the entry, but at most only caused it to be false, when later made while the slip was withheld. So, the conclusion is inescapable that respondent neither made the entry, nor caused it to be made, and his act did not cause the entry to exist, nor appear, nor occur. Subsequent and wholly independent acts, which he had no part in, but naturally ran the risk of, caused the entry to be made,—to exist, appear, or occur.

The question is thus narrowed to the plain one, whether this statute penalizes an act which results in an entry, later independently made by another, being false, but which act *neither causes nor results in* the *entry being made.*

Is an act which neither amounts to the *making* or *causing to be made* of a false entry, but which merely omits to report a fact, and which *omission results* in the entry *being false* when another person independently makes it not knowing of the omission, the "making of a false entry", under the statute?

Since respondent neither made, nor caused to be made, the entry, since it was made by another without regard or relation to the fact he had done that which would make it false, if made, does this statute, the penalty imposed by which is "affixed to *him who makes* the false entry," penalize as well one whose prior act or omission, unrelated to the actual making of the entry, causes the entry by another to be false?

The decision in Morse v. United States, 174 Fed. 539, cited in Your Honors' opinion, we respectfully submit, does not reach, nor touch, the question. There the accused, head of the bank, the entrants his subordinates, devised the false scheme and directly caused the entries to be made. There the *actual entries, not* the mere falsity thereof, "necessarily resulted" from his direction to his subordinates. There he, as deviser of the scheme, put it into execution and directed it to completion. That he was *principal* in the offense no doubt can exist. His was not an act of withholding, or omitting to report, which resulted merely in the *falsity* of entries when they were made; but his act actually caused and directly resulted in the *making*, that is, the *actual writing*, of the entries.

The Court will, therefore, not fail to understand our point, when we say that the question for decision here was

not involved there; and that case is no authority for the question here. We, too, agree with the Morse decision. The question here, however, is *not* whether respondent caused the entries to be made; for that, by the undisputed facts, he did *not* do. The question here is quite different. It is, does the *making of an entry false* (which is *entirely different* from *making a false entry*, and which does not contemplate nor comprehend the fact the act consists of, or results in, the *actual making* of the entry) come within this statute which does not purport to punish, nor say that it punishes, the *making of an entry false*, but only the *making of a false entry*, and is hence, directed only *against the entrant?* Manifestly not. The rules for construction forbid it. We agree with this Court that no rule requires words to receive their narrowest meaning. But the very authority cited by the Court to support that rule, in conformity with so many pronouncements of this Court, announces that the intention must be gathered from the words of the statute, and "they must be such as to leave no room for a reasonable doubt upon the subject." "Before a man can be punished, his case must be plainly and unmistakably within the statute;" and "words may not be extended beyond their natural meaning in order to create an offense by construction merely." To hold that a statute which punishes only the *making* of the entry which is false, may be interpreted to punish as well him who did *not* make, nor *cause* the making of the entry, but whose act consisted only in doing that which resulted in its falsity when the innocent entrant independently made it is, we submit, to extend the statute beyond just limits of construction. One may take every of the many meanings of the word "make" as found in Webster's, or in Century, or any other, dictionary to which we have found access, of whatever extended dimensions, and yet it cannot be justly said that respondent made,

or caused to be made, the entry, because that is not true, under the disputed facts. His omission but resulted in the *falsity* of *another's* entry. Congress had the right and power to make this statute more comprehensive, and to include an act or omission which causes the falsity of an entry, even though made by another not principal with nor directed by the one who causes the falsity; but it did not do that. The English statute, pointed out to the Court in our brief, does punish the omission, and is clearly broad enough to have covered this case. We are justified in presuming that Congress was aware of the English statute; but it punished, by its enactment, *only him who makes* the entry which is false. It has not punished him whose only act causes or results in the falsity of another's entry.

We repeat, what was said in our brief, that if respondent and entrant had been principals, sharing the guilty mind, respondent could have been punished, and, as we think, under this indictment, because a principal. Had his act in withholding the slips, under the doctrine of innocent agent, accomplished the completed crime, in its direct causal connection, we would say he was sole principal, and should be punished. But it requires no argument to know he is not principal, either under the general statute, or under the innocent agent doctrine. The only possible way to hold him guilty is to supply, by construction, a clause which Congress has omitted, and this, of course, is unauthorized.

More need not be said. We have attempted to make plain the facts, heretofore misapprehended; and this Court will know that the principles we contend for apply.

Our conception is that this great Court, by its uniform adherence to accepted principles of constitutional and statutory construction, has thus far alone preserved our liberties, when those who would depart from rule and precedent would destroy them. As was said by the Texas

Court of Criminal Appeals, in reluctantly reversing conviction in aggravated case, (Smith vs. State, 113 Tex. Crim. Rep. 212) "we believe it imperative to adhere to the established rules of law." It is, therefore, we submit, less that an innocent man should suffer, and be ruined, than that salutary precedent and rule shall be preserved. Sincerely believing, therefore, that the opinion handed down misapprehends the effect of the undisputed facts, and the applicable principle, we respectfully pray, for respondent, the earnest consideration by Your Honors of what we have attempted to say, and for rehearing.

NAT L. HARDY,
WILL A. MORRISS,
San Antonio, Texas,
Attorneys for Respondent,
John J. Giles.

CERTIFICATE OF COUNSEL.

We, counsel for the above named John J. Giles, respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

NAT L. HARDY,
WILL A. MORRISS,
Attorneys for John J. Giles, Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 329.—October Term, 1936.

The United States of America, Petitioner, *vs.* John J. Giles.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 1, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

Section 5209 R. S.,[1] as amended by Act Sept. 26, 1918, c. 177, 40 Stat. 967, 972 (U. S. C., Title 12, Sec. 592) provides:

"Any officer, director, agent, or employee of any Federal reserve bank, or of any member bank . . . who *makes* any false entry in any book, report, or statement of such Federal reserve bank or member bank, with intent in any case to injure or defraud such Federal reserve bank or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve bank or member bank, or the Comptroller of the Currency, or any agent or examiner appointed to examine the affairs of such Federal reserve bank or member banks, or the Federal Reserve Board . . . shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000

[1] Sec. 5209 R. S., Title LXII, National Banks, Ch. 3. "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

or shall be imprisoned for not more than five years, or both, in the discretion of the court."

Count three of an indictment in the United States District Court, Western District of Texas, charged that respondent Giles, while employed as teller by the Commercial National Bank of San Antonio, Texas, a member of the Federal Reserve National Bank of Dallas, did "unlawfully, knowingly, wilfully, fraudulently, and feloniously *make and cause to be made* in a book of the said The Commercial National Bank of San Antonio, Texas, known as the Individual Ledger, in the account designated 'S. A. Public Service Company', under date of 'Jul 25 '33' in the column bearing the printed heading 'Balance', being the fifth entry from the top of the column aforesaid, and directly opposite the machine printed date thereon 'July 25 33', a certain false entry in the following figures, to wit, '7,874.07', which said entry so made as aforesaid, purports to show and does in substance and effect indicate and declare that The Commercial National Bank of San Antonio, Texas, was indebted and liable to the San Antonio Public Service Company in the amount of Seven Thousand Eight Hundred Seventy-Four Dollars and Seven Cents ($7,874.07) on July 25, 1933, whereas in truth and in fact said indebtedness and liability on said date was a different and much larger amount."

Count four made a like charge relative to the account of the National Life and Accident Insurance Company.

He was tried, found guilty, and sentenced under both counts. The point for our decision is whether the trial court erred in refusing to direct a verdict of not guilty. The essential facts are not in dispute.

From the evidence it appears—

Giles, once bookkeeper for the Commercial National Bank, became first paying and receiving teller with custody each day of some $35,000.00 cash. His duty was to receive deposits and place accompanying slips or tickets where they would reach the bookkeepers for entry. Eighteen months prior to the alleged offense, he discovered shortage in his cash but made no report to his superiors. To cover up the shortage he resorted to the practice of withholding selected deposit slips for three or four days before permitting them to reach the bookkeeping department. This caused the ledger to show false

balances. Other shortages occurred; July 25, 1933, the total stood at $2,650.00.

On that day he accepted deposits with proper tickets from San Antonio Public Service Company and National Life and Accident Insurance Company for $1,985.79 and $663.27 respectively, accompanied by cash and checks. Together these approximated his shortage. He withheld both tickets from the place where they should have gone and secreted them. If placed as usual and as his duty required, they would have reached the bookkeeper during the day. Entries on the ledger would have shown the depositors' true balances.

The Bank closed July 29th. The slips never reached the bookkeeper. The individual ledger accounts at the end of the 25th and thereafter understated the liability of the Bank to the depositors.

The respondent acknowledged his purpose in withholding the deposit tickets was to prevent officers and examiners from discovering his shortage. Some excerpts from his testimony are in the margin.[2]

At the conclusion of the evidence counsel moved for a directed verdict of not guilty. This was denied. The jury found guilt under both counts; an appeal, with many assignments of error, went to the Circuit Court of Appeals.

---

[2] "My actual shortage was $2,650.00 that had shown up without my having any responsibility for it. The only way it could be carried was holding out deposit tickets to offset the shortage in the cash, and on the 25th of July withholding these two deposits, the San Antonio Public Service and the National Life & Accident, and depositing the two tickets that had been held over from the 21st.

"Asked if I selected those two deposit slips that day to withhold them because they, together, made up the amount of the shortage, that was the reason I selected those two, because it covered the amount of the shortage.

"The bank got the money for both of those deposits. I did not make any false entries with reference to those items. It is true that all I did was simply put the deposit slips in the cigar box and withheld them for the time being, until I could recover the shortage. I did not make any report to any bookkeeper. As to how the bookkeeping department received its information on which they keep their books, the bookkeepers came in three or four times a day and lots of days oftener, and took the deposit tickets and checks out of the drawers. The business of the day was represented by the tickets and checks. I would put those in the drawers; I had a special drawer for them, divided into sections. As to whether I took them to the bookkeepers or they came to the drawers whenever they wanted to and get them—they came and got them whether I was there or not. I had no control or direction whatever over the bookkeeping department or any bookkeeper. Mr. Crowther had control and direction over the bookkeepers; really, Mr. Roberts handled them, but Mr. Crowther was over the bookkeepers. If the entries were made on any given date showing the balance of any depositors, etc., I did not have anything

That Court declared: "The serious question presented for decision is whether the law will support a conviction on an indictment charging that defendant caused the false entries to be made."

"Of course, in a sense, one who makes a false entry causes it to be made. If he makes an entry himself or directs another to make it, an allegation in the indictment that he caused it to be made may be treated as surplusage and harmless, but where the defendant has neither made a false entry nor directed another to do so, the same allegation is material and injurious. A charge that one has caused a false entry to be made is very much broader than the charge that he made it." "We consider the allegation of the indictment that defendant did 'cause to be made a certain false

---

whatever to do with making the entries or causing them to be made. They simply came to the drawers and got the checks and deposit slips, and from that made up their entries. These two deposit slips that were withheld and stuck in the cigar box that day would have gone right on into the books in time if the bank had not closed. They were simply withheld that way to make my cash balance; that was the only way I had of doing that. I withheld deposit tickets from time to time in order that my cash shortage would not be discovered.

"With regard to the two deposits that are directly in question in this case, one to the National Life & Accident Company and one to the San Antonio Public Service Company, each on the 25th of July, 1933, I withheld those two deposit tickets from the bookkeepers. Asked if instead of putting them in the drawer with the balance of the deposit tickets for that day, I put them in a different place where I knew the bookkeepers would not look for them, yes, sir, I put them in the cigar box. The bookkeepers had nothing to do with the cigar box. The bookkeepers would go to the regular place where the deposit slips were kept to get them. The reason I put the two deposit tickets in the cigar box was for the sole and only purpose of keeping them from the bookkeepers to keep them from going through, to keep them from going on the account of the depositors.

"Asked if by putting deposit slips in a place where he would not get them and I knew he would not get them, I had that much control over the bookkeepers, yes, sir, by holding them out, of course, he would not get them.

"Q. Now I show you one of the Government's Exhibits, which is the individual ledger account of the San Antonio Public Service Company in the right hand column, the 5th line from the top of the page, an entry under date of July 25th, 1933, under the column head 'new balance' which is the last balance of that account shown for July 25th, 1933, of $7,874.07; was that the true balance of that account on that date? A. That was the true balance of everything that went through to the account. Q. That is right, but was that a true balance on the account; do the figures, 7,874.07, represent the liability of the Commercial National Bank to the San Antonio Public Service Company at the close of business on July 25th, 1933? A. No, sir; the deposit slip was in my cage of $1,985.79.

"Q. And then this entry of $7,874.07 is not correct, because you did not let the bookkeepers have the deposit ticket? A. We often held deposit tickets over. Q. But you withheld it for a purpose, didn't you? A. Yes, sir. Q. Your intention in withholding it was so that it would not go on the ledger sheet, wasn't it? A. Yes, sir; I put it in the cigar box.

"I did not make any entries or figures of any sort from which the bookkeepers might have got it off the entries. The only entry I ever made was in the depositor's pass book. I therefore made no other entries."

entry in a book of the bank', charged a degree and classification of the offense not within the letter or intent of the law." "The evidence in the record conclusively shows that defendant neither made the false entries nor did anything that could be considered as a direction to the bookkeeper to make them. Without the charge that he caused the entries to be made he could not have been convicted. It follows that it was prejudicial error to overrule the motion for a directed verdict of acquittal."

Dissenting, one judge said:

"This statute plainly intends to punish the falsification of bank records with intent to deceive or defraud. If false entries are deliberately produced, although through an ignorantly innocent agent, the bank employee who concocts the plan and achieves the result is, in my opinion, guilty. This innocent bookkeeper was the teller's real though unconscious agent in making the entries; as truly so as if the false entries had been requested in words." "The present case is not one of a mere failure to prevent a consequence, but is one of contriving that consequence and so fathering it as to make it wholly the contriver's own. The bookkeeper in making these false entries was doing the will of the teller, though he did not know it. The false entries are in law the acts of the teller who planned them and did all he needed to do to produce them."

Counsel for the petitioner now affirm: "There is no dispute as to the facts." "The act committed by the defendant was the withholding by him and the failure by him to turn over to the Bookkeeping Department in the usual course of the bank's business a deposit slip." He did not *cause* any false entry to be made. Personally he made no such entry; he did not affirmatively direct one. By withholding the ticket he prevented an entry; he caused none.

The rule, often announced, that criminal statutes must be strictly construed does not require that the words of an enactment be given their narrowest meaning or that the lawmaker's evident intent be disregarded. *United States* v. *Corbett*, 215 U. S. 233, 242. Here the purpose to insure the correctness of bank records by prescribing punishment for any employee who, with intent to deceive, etc., deliberately brings about their falsification is plain enough. The statute denounces as criminal one who with intent, etc., "makes any false entry." The word "make" has many meanings, among them "To cause to exist, appear or occur," Webster's International Dictionary, 2nd Ed. To hold the statute broad enough to include deliberate action from which a false entry by an

innocent intermediary necessarily follows, gives to the words employed their fair meaning and is in accord with the evident intent of Congress. To hold that it applies only when the accused personally writes the false entry or affirmatively directs another so to do would emasculate the statute—defeat the very end in view.

Morse v. *United States,* 174 Fed. 539, 547, 553—Circuit Court of Appeals, Second Circuit—gave much consideration to an indictment and conviction under R. S., § 5209. The Court said: "It is true that the defendant did not make any of the entries in the books or reports with his own pen. All of them were made by the employees of the bank as part of their routine work. If it were necessary to prove against a director that he actually made the entry charged to be false, conviction under the statute would be impossible, as these entries are invariably made by subordinates in the executive department. Congress was not seeking to punish the ignorant bookkeeper who copies items into the books as part of his daily task, but the officers who conceived and carried out the fraudulent scheme which the false entry was designed to conceal. It is wholly immaterial whether such officer acts through a pen or a clerk controlled by him." "It seems to us that defendant is as fully responsible for any false entries which necessarily result from the presentation of these pieces of paper which he caused to be prepared as he would if he had given oral instructions in reference to them or had written them himself."

We agree with the view so expressed in that opinion. *United States* v. *McClarty,* 191 Fed. 518 and 523, apparently is in conflict with our conclusion.

The record leaves us in no doubt that the false entries on the ledger were the intended and necessary result of respondent's deliberate action in withholding the deposit tickets. Within the statute he made them.

The judgment of the Circuit Court of Appeals must be reversed. The District Court will be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.